

BEFORE THE KANSAS WORKERS COMPENSATION APPEALS BOARD

SHANNON CLARK)	
Claimant)	
V.)	
)	Docket No. 1,072,497
MITSU SATO HAIR ACADEMY)	
Respondent)	
AND)	
)	
UNKNOWN)	
Insurance Carrier)	
AND)	
)	
THE WORKERS COMPENSATION FUND)	

ORDER

Claimant requests review of the May 14, 2015, preliminary hearing Order entered by Administrative Law Judge (ALJ) Kenneth J. Hursh.

APPEARANCES

Timothy E. Power, of Overland Park, Kansas, appeared for the claimant. Clifford K. Stubbs, of Kansas City, Kansas, appeared for respondent. Ronald P. Wood, of Overland Park, Kansas, appeared for the Workers Compensation Fund (Fund).

RECORD AND STIPULATIONS

The Board has adopted the same stipulations and considered the same record as did the ALJ, consisting of the transcript of Preliminary Hearing from May 13, 2015, with exhibits attached and the documents of record filed with the Division.

ISSUES

The ALJ denied claimant's request for medical benefits finding claimant's L4-5 abnormality was a preexisting condition aggravated or made symptomatic by her car accident.

Claimant appeals, arguing the ALJ's Order should be reversed. Claimant contends the totality of the medical evidence clearly indicates the automobile crash was the prevailing factor rendering the previously asymptomatic lumbar condition symptomatic and generating the necessity for treatment. Therefore, claimant contends the ALJ exceeded his authority in denying benefits based upon a finding the lumbar spine merely aggravated a preexisting condition.

Respondent argues the ALJ's Order should be affirmed.

FINDINGS OF FACT

Claimant began working for respondent in March 2013 as a director of admissions. Soon after she was hired she took over marketing discipline, curriculum instruction and any extracurricular events the students attended. Claimant's job involved traveling and she was paid for her time to and from the work locations.

On September 12, 2013, claimant was driving to Independence, Missouri, for an event. As she exited the highway, she swerved and rear-ended the car in front of her. Claimant indicated she was going 20 to 25 miles per hour. This accident occurred around 4:15 p.m. in Kansas City, Missouri. At the scene of the accident, claimant had physical complaints of soreness in her shoulders, neck and back due to the deployment of her airbag. She did not think the soreness was a big deal, but she immediately notified Teri Kline, the administrator for respondent and then called Melissa Blayton to cover supervising the students at the event. Claimant also informed the owner of the academy, Mitsu Sato, of the accident.

Claimant continued to work for respondent and a week later, on September 19, 2013, she sought medical treatment with her family physician, David Edalati, M.D. Claimant reported headaches, neck pain, shoulder pain and low back pain. Dr. Edalati ordered x-rays and a CT scan. X-rays showed abnormal alignment with 25 percent anterolisthesis of L4 due to a spondylolysis involving the left pars interarticularis at L4-5, and the disc height at L4-5 and L5-S1 was reduced. Claimant understood from her visit with Dr. Edalati that her pain would go away with time. Instead her pain got worse with time and eventually settled in her low back. Claimant indicated that four weeks later the pain started to move down into the front of her right leg.

Claimant informed the owner of respondent, Mitsu Sato, before seeking medical treatment and testified she was told he would pay the bills and she was to have them sent to the office. However, the bills were never paid. Claimant testified that when she reported the accident, she asked if they had workers compensation insurance and was told yes, but by December 2013, she was told they did not have insurance. Claimant ended up submitting the bills to her auto insurance. Claimant had health insurance until January 2014 when her husband's job changed and he was no longer eligible for health insurance. Respondent did not offer health insurance.

Claimant's employment was terminated on April 2, 2014, due to a decline in her job performance. She explained the circumstances of the decline:

A. We had begun to have issues a few months before that when he had asked me to take an applicant's weight into consideration during the admissions process; and if I had an overweight student or potential student come in, he wanted me to discuss diet and exercise with them; and I continued to tell him that I could not use weight as a prerequisite for entrance into the school.

And so it became very difficult for me to recruit students coming into a situation to where they were going to be treated badly if they happened to be a little bit overweight, according to standards, and my job performance declined.¹

Claimant collected unemployment for a time and then worked for a med spa for almost a month. She also started a home workout routine with her husband. She does nonweight-bearing activities and core strengthening exercises.

Claimant met with chiropractor, Larisa Schabel, BS, D.C., for treatment, with the first visit with Dr. Schabel on July 17, 2014. Dr. Schabel's records indicated claimant was in a motor vehicle accident where claimant was rear-ended by a car going 30-40 miles per hour.

Claimant presented to Dr. Schabel with complaints of low back pain with occasional right leg pain from the right buttocks traveling laterally to the thigh and into the right medial knee. Claimant indicated these complaints were due to the car accident in September 2013. This was the first mention of leg pain in any medical report. This was also the first claimant had sought treatment since the examinations with Dr. Edalati. Claimant testified this was because respondent had no workers compensation coverage and she no longer had health insurance through her husband's job and therefore had no way to pay. Claimant's mother helped pay for the treatment with Dr. Schabel.

Claimant advised Dr. Schabel that sitting and standing for too long worsened her pain. Claimant reported feeling much better, with no low back pain, following treatment. The chiropractic treatment claimant received provided relief for a couple of days after every session, before the pain would come back. Eventually, claimant was able to control her pain with exercise.

Dr. Schabel treated claimant from July 17 to November 24, 2014. During that time, she experienced some relief from chiropractic adjustments and from running and, on several occasions, claimant reported the right leg pain disappeared entirely. The return of claimant's leg pain appeared to be connected to the amount of walking claimant would do between treatments. Surprisingly, claimant's leg pain, while increased with walking,

¹ P.H. Trans. at 13-14.

appeared to benefit from running. Ultimately, claimant indicated to Dr. Schabel she was pleased with the outcome of her treatment.

In January 2015, claimant regained health insurance when her husband's job again changed. Claimant filed her workers compensation claim and met with Sean Jackson, M.D., on her own on January 29, 2015. Claimant was examined and diagnosed with isthmic spondylolisthesis at L4-5 with foraminal stenosis and back and leg pain. Claimant's history indicated a worsening of her condition in May of 2014, with predominately right lateral leg pain down to about the knee and low back discomfort. Formal therapy was considered the best option to try first, to be followed, if necessary, by a series of epidural steroid injections.

Claimant is currently working out of her home as the CEO of a home inspection company. She takes care of the marketing, human resources, scheduling, etc. She testified to doing everything except the home inspections. She began this job on February 2, 2015. All of claimant's work since she was terminated by respondent has been office work with some lifting of no more than 5 pounds.

Claimant testified she has been doing a home workout routine to strengthen her core muscles, which has only slightly improved her condition. She indicated she works out four to six times a week for an hour and half to two hours. She continues to feel pain everyday. She indicated her pain begins in her low back and radiates down to her foot. She testified the pain was not as bad if she worked out in the morning, but is constant if she sits, stands or walks on a flat surface for too long. Claimant denied any treatment to her low back before the accident on September 12, 2013.

Claimant acknowledged there was no mention of leg pain until July 2014, explaining she could not afford to see a doctor until the pain became unbearable. This lapse in medical treatment was due to respondent not having workers compensation or health insurance and to claimant's husband losing his health insurance. When claimant first sought treatment with Dr. Schabel, she had no insurance and was receiving assistance in paying for the treatments from her mother.

In an April 29, 2015, report, Dr. Edalati ultimately opined:

Kim was treated for low back pain, neck pain, and a potential head injury. A CT scan of the head was read as normal. Subsequently, Kim received some chiropractic treatment for her lumbar spine which did provide some temporary relief. Kim was recently seen by Dr. Sean Jackson at KU. The MRI revealed spondylotheisis at L4-L5 which became symptomatic after the automobile crash. There was an annular tear L5-S1. The L4-L5 disc was protruded compromising anterior epidural space. The foraminal L4-L5 was compromised as well. Dr. Jackson has recommended physical therapy, injections and potential surgery if conservative measures fail. I agree with this assessment, and treatment plan.

In terms of medical causation, it is my opinion that the prevailing factor for her lumbar complaints is the work related automobile crash on September 12, 2013. I would point out that Kim, to the best of my knowledge, did not have any significant lumbar complaints prior to the automobile crash. Certainly, there is nothing in my records to indicate prior back problems. It is my further opinion that the medical bills incurred to date are a result of the automobile crash.

Kim's present complaints are primarily low back pain with occasional radiculopathy. I think it is imperative that medical treatment be commenced immediately given the diagnosis testing and chronicity of her complaints.²

PRINCIPLES OF LAW AND ANALYSIS

K.S.A. 2013 Supp. 44-501b(a)(b)(c) states:

(a) It is the intent of the legislature that the workers compensation act shall be liberally construed only for the purpose of bringing employers and employees within the provisions of the act. The provisions of the workers compensation act shall be applied impartially to both employers and employees in cases arising thereunder.

(b) If in any employment to which the workers compensation act applies, an employee suffers personal injury by accident, repetitive trauma or occupational disease arising out of and in the course of employment, the employer shall be liable to pay compensation to the employee in accordance with and subject to the provisions of the workers compensation act.

(c) The burden of proof shall be on the claimant to establish the claimant's right to an award of compensation and to prove the various conditions on which the claimant's right depends. In determining whether the claimant has satisfied this burden of proof, the trier of fact shall consider the whole record.

An injury arises out of employment if it arises out of the nature, conditions, obligations and incidents of the employment.³

K.S.A. 2013 Supp. 44-508(d) states:

(d) "Accident" means an undesigned, sudden and unexpected traumatic event, usually of an afflictive or unfortunate nature and often, but not necessarily, accompanied by a manifestation of force. An accident shall be identifiable by time and place of occurrence, produce at the time symptoms of an injury, and occur during a single work shift. The accident must be the prevailing factor in causing the

² P.H. Trans., Cl. Ex. 1 at 3 (Dr. Edalati's Apr. 29, 2015, letter). (The record indicates claimant also goes by the name of Kim).

³ *Brobst v. Brighton Place North*, 24 Kan. App. 2d 766, 955 P.2d 1315 (1997).

injury. "Accident" shall in no case be construed to include repetitive trauma in any form.

K.S.A. 2013 Supp. 44-508(f)(1)(2)(B) states:

(f)(1) "Personal injury" and "injury" mean any lesion or change in the physical structure of the body, causing damage or harm thereto. Personal injury or injury may occur only by accident, repetitive trauma or occupational disease as those terms are defined.

(2) An injury is compensable only if it arises out of and in the course of employment. An injury is not compensable because work was a triggering or precipitating factor. An injury is not compensable solely because it aggravates, accelerates or exacerbates a preexisting condition or renders a preexisting condition symptomatic.

...

(B) An injury by accident shall be deemed to arise out of employment only if:

(i) There is a causal connection between the conditions under which the work is required to be performed and the resulting accident; and

(ii) the accident is the prevailing factor causing the injury, medical condition, and resulting disability or impairment.

K.S.A. 2013 Supp. 44-508(g) states:

(g) "Prevailing" as it relates to the term "factor" means the primary factor, in relation to any other factor. In determining what constitutes the "prevailing factor" in a given case, the administrative law judge shall consider all relevant evidence submitted by the parties.

The ALJ concluded claimant failed to meet her burden of proving the automobile accident was the prevailing factor leading to the need for the requested medical treatment. The ALJ found the evidence proved claimant had a preexisting condition which was aggravated or made symptomatic by the car accident and is a non-compensable injury.

This Board Member disagrees with the determinations by the ALJ. This record is void of any indication claimant suffered prior back problems before this accident. The medical reports do indicate claimant had preexisting degenerative problems in her low back. However, that does not answer the entire question with this claimant.

The Kansas Legislature provided clear indication that the previous practice in workers compensation to award benefits if an accident merely aggravated or accelerated a preexisting condition is no longer the policy in this state. The 2011 amendments to the Workers Compensation Act require that an accident must be the prevailing factor causing the injury, medical condition and resulting disability or impairment and an accidental injury is not compensable solely because it aggravates, accelerates or exacerbates a preexisting condition or renders a preexisting condition symptomatic.

Recent Board decisions are helpful on this issue. The Board has recently determined that accidental injuries resulting in a new physical finding, or a change in the physical structure of the body, are compensable, despite a claimant having an aggravation of a preexisting condition. These decisions tend to show compensability where there is a demonstrated physical injury above and beyond an aggravation of a preexisting condition. Prior decisions of the Board on this issue follow:

A claimant's accident did not "solely" cause an aggravation of preexisting carpal tunnel syndrome when the accident also caused a triangular fibrocartilage tear.⁴

A low back injury resulting in a new disk herniation and new radicular symptoms was not solely an aggravation of a preexisting lumbar condition.⁵

A claimant's preexisting ACL reconstruction and mild arthritic changes in his knee were not solely aggravated, accelerated or exacerbated by an injury where his repetitive trauma resulted in a new finding, a meniscus tear, that was not preexisting.⁶

An accident did not solely aggravate, accelerate or exacerbate claimant's preexisting knee condition where the court ordered doctor opined that the accident caused a new tear in claimant's medial meniscus.⁷

Claimant had a prior partial ligament rupture, but a new accident caused a complete rupture, "a change in the physical structure" of his wrist, which was compensable.⁸

A motor vehicle accident did not solely aggravate, accelerate or exacerbate a claimant's underlying spondylolisthesis when the injury changed the physical structure of claimant's preexisting and stable spondylolisthesis.⁹

In this instance, the only prevailing factor opinion was that rendered by Dr. Edalati. While Dr. Edalati noted the spondylothesis at L4-5 became symptomatic after the automobile crash, he also noted an annular tear at L5-S1 and a disc protrusion compromising the anterior epidural space at L4-5.

⁴ *Homan v. U.S.D.* #259, No. 1,058,385, 2012 WL 2061780 (Kan. WCAB May 23, 2012).

⁵ *MacIntosh v. Goodyear Tire & Rubber Co.*, No. 1,057,563, 2012 WL 369786 (Kan. WCAB Jan. 31, 2012).

⁶ *Short v. Interstate Brands Corp.*, No. 1,058,446, 2012 WL 3279502 (Kan. WCAB July 13, 2012).

⁷ *Folks v. State of Kansas*, No. 1,059,490, 2012 WL 4040471 (Kan. WCAB Aug. 30, 2012).

⁸ *Ragan v. Shawnee County*, No. 1,059,278, 2012 WL 2061787 (Kan. WCAB May 30, 2012).

⁹ *Gilpin v. Lanier Trucking Co.*, No. 1,059,754, 2012 WL 6101121 (Kan. WCAB Nov. 20, 2012).

The undersigned Board Member finds claimant's accident was the prevailing factor causing new physical findings and changes in the physical structure of claimant's body, despite claimant also having an aggravation of a preexisting condition. The Order of the ALJ is reversed and the matter remanded to the ALJ for proceedings consistent with this decision.

By statute, the above preliminary hearing findings and conclusions are neither final nor binding as they may be modified upon a full hearing of the claim.¹⁰ Moreover, this review of a preliminary hearing Order has been determined by only one Board Member, as permitted by K.S.A. 2014 Supp. 44-551(l)(2)(A), unlike appeals of final orders, which are considered by all five members of the Board.

CONCLUSIONS

After reviewing the record compiled to date, the undersigned Board Member concludes the preliminary hearing Order should be reversed. Claimant has satisfied her burden of proving she suffered personal injury by accident and that accident is the prevailing factor leading to her injury, disability, medical condition and need for medical treatment.

DECISION

WHEREFORE, it is the finding, decision and order of the undersigned Board Member that the Order of Administrative Law Judge Kenneth J. Hursh dated May 14, 2015, is reversed and the matter remanded to the ALJ for further proceedings consistent with this Order.

¹⁰ K.S.A. 2014 Supp. 44-534a.

IT IS SO ORDERED.

Dated this _____ day of August, 2015.

HONORABLE GARY M. KORTE
BOARD MEMBER

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